

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

| | | |
|---------------------------------|---|-------------------------|
| In re: |) | |
| |) | |
| GALO L. TAN and MARDONA TAN, |) | No. 95 B 25570 |
| |) | |
| Debtors. |) | Honorable Erwin I. Katz |
| |) | |
| FOREST PARTNERS II LIMITED |) | |
| PARTNERSHIP and GALO M. TAN, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | No. 98 A 02049 |
| |) | |
| FOREST GROUP, INC. ROBERT LANE, |) | |
| RANDALL PITTMAN, LAURENCE |) | |
| LENZ, JR., and KATTEN, MUCHIN & |) | |
| ZAVIS, a law firm partnership, |) | |
| |) | |
| Defendants. |) | |

MEMORANDUM OPINION

This matter is before the Court on the motion of Forest Partners II Limited Partnership and Galo M. Tan (collectively, the “Tan Group”) for remand of their malicious prosecution case to the Circuit Court of Cook County, Illinois. The Tan Group moves for abstention and remand following removal of the case to this Court by Laurence Lenz, Jr. (“Lenz”) and Katten, Muchin & Zavis (“KMZ”). For the reasons that follow, the Court grants the Tan Group’s motion for remand.

BACKGROUND

On December 1, 1995, Galo M. Tan (“Tan”) and Mardona Tan (collectively, the “Debtors”) filed a petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et. seq.* The Debtors have yet to file a confirmable plan of reorganization.

Tan is the general partner of Forest Partners II Limited Partnership (“Forest Partners”).

Forest Group, Inc. (“Forest Group”) was also a general partner of Forest Partners until February 6, 1992. Robert Lane (“Lane”) and Randall Pittman (“Pittman”) are the sole shareholders, officers, and directors of Forest Group.

KMZ is a law firm headquartered in Chicago. Lenz is a partner in KMZ.

On October 6, 1998, the Tan Group filed a one-count complaint for the tort of malicious prosecution against Forest Group, Lane, Pittman, Lenz, and KMZ (collectively, the “Defendants”) in the Circuit Court of Cook County, Illinois. The Tan Group seeks damages of not less than \$30 million. Although the complaint has only one count, it alleges a series of actions which commenced in 1990 and run through the present time.

The Tan Group alleges that in 1992, KMZ filed a false and malicious lawsuit on behalf of Forest Group, Lane, and Pittman against Tan, Forest Partners, and the individual limited partners of Forest Partners seeking \$20 million in special damages, \$8 million in compensatory damages, and at least \$15 million in punitive damages. The Tan Group alleges that in August 1995, KMZ filed a false and malicious lawsuit on behalf of Lane and Pittman against Forest Partners and Tan seeking an award of \$400,000. The Circuit Court of Cook County, Illinois entered judgment in favor of the Tan Group in both cases. The Tan Group alleges that as a result of the Defendants’ prosecution of these two lawsuits, Tan was forced to file his bankruptcy petition before this Court.

The Tan Group further alleges that KMZ, on behalf of Forest Group, Lane, and Pittman, filed false bankruptcy claims totaling \$24 million against Tan. The Tan Group claims that the Defendants filed these claims to: (1) force Tan out of Chapter 11 and into Chapter 7 of the Bankruptcy Code; (2) to impair Tan’s rights to proceed with his defense and counterclaim against Forest Group, Lane, and Pittman; (3) and to impede a lawsuit Tan had filed against KMZ. Tan also

alleges that KMZ instigated Victory Memorial Hospital, for which KMZ was general counsel, to file suit against Summitcare, a corporation of which Tan is the sole shareholder.

Lenz and KMZ timely filed a Notice of Removal and removed the malicious prosecution case to this Court. The Tan Group timely filed an Answer and the present Motion for Remand.

DISCUSSION

The Defendants argue that the Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. Section 1334 provides in pertinent part:

- (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
- (b) Notwithstanding any act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334. Section 157 provides in pertinent part:

- (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
- (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

28 U.S.C. § 157. The District Court for the Northern District of Illinois has referred any and all proceedings arising under title 11, or arising in or related to any case under title 11 to the bankruptcy judges of the District. Local Rule 2.33 (N.D. Ill.).

Thus, only if this matter arises under title 11 or arises in or is related to any case under title 11 does this Court have jurisdiction. Bankruptcy jurisdiction should be interpreted narrowly. *In re*

Fedpak Systems, Inc., 80 F.3d 207, 211 (7th Cir. 1996).

A matter “arising under” title 11 involves a cause of action created or determined by a statutory provision of title 11. *Barnett v. Stern*, 909 F.2d 973, 981 (7th Cir. 1990); *Wood v. Wood (In re Wood)*, 825 F.2d 90, 96 (5th Cir. 1987). A proceeding “arising in” a case under title 11 involves those administrative matters that arise only in bankruptcy cases. *Diamond Mtg. Corp. of Illinois v. Sugar*, 913 F.2d 1233, 1239 (7th Cir. 1990); *Wood*, 825 F.2d at 97. “[A]rising in’ proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy.” *Wood*, 825 F.2d at 97.

The Tan Group’s state law malicious prosecution claim is not and cannot be a cause of action created or determined by a statutory provision of title 11. Title 11 makes no provisions for malicious prosecutions. The instant proceeding does not arise under title 11.

Nor is an action for malicious prosecution, arising under state law, ordinarily a proceeding involving administrative matters that arise only in bankruptcy cases. A malicious prosecution action can arise in any type of case. Indeed, the two lawsuits out of which the Tan Group’s Complaint arose were not bankruptcy cases, but state law claims for fraud and breach of fiduciary duty commenced before the Debtor sought relief in bankruptcy.

However, the Defendants argue, when a state law malicious prosecution complaint is based upon allegations that the defendant filed false claims against the bankruptcy estate, federal bankruptcy law may preempt the case. *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 916 (9th Cir. 1996). The expansive reach of the Code preempts virtually all claims relating to alleged misconduct in the bankruptcy courts. *Holloway v. Household Automotive Finance Corp.*, 227 B.R. 501, 507 (N.D.Ill. 1998); *Cox v. Zale Delaware, Inc.*, 1998 WL 397841 (N.D.Ill.); *see also*,

In re Shape, Inc., 135 B.R. 707, 708 (Bankr.D.Me. 1992) (holding bankruptcy law preempted a state law unfair business practices claim, based entirely upon violations of the automatic stay, that was dependent for its existence upon the Bankruptcy Code and was “intimately tied” to the debtor’s bankruptcy). We agree with the Defendants that an allegation of false claims against a bankruptcy estate can arise only within the context of a bankruptcy. However, the situation presently before us is factually distinguishable from that in *MSR*.

In *MSR*, upon which the Defendants heavily rely, the sole basis for the malicious prosecution action was claims filed against the bankruptcy estate which the bankruptcy court subsequently disallowed. In *Cox*, the plaintiff’s unfair debt collection claims were based entirely upon violations of 11 U.S.C. §§ 362 and 524. In *Holloway*, the plaintiff asserted that the defendant violated the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et. seq.*, by fraudulently valuing a secured claim against the estate in violation of 11 U.S.C. § 506. The unfair business practices complaint in *Shape* alleged only violations of the automatic stay provisions of the Code.

In the matter now before the Court, the Tan Group alleges a series of actions, most of which happened outside the bankruptcy and before Tan filed his petition for relief. The Tan Group’s allegations that the Defendants filed false claims against the bankruptcy estate form a relatively small, and likely insignificant, portion of the complaint.

In Illinois, the elements of a claim for malicious prosecution are: (1) that the defendant brought the underlying lawsuit maliciously; (2) that the defendant brought the suit without probable cause; (3) that the lawsuit terminated in the plaintiff’s favor; and (4) that the plaintiff suffered special damages in defending the suit. *Spiegel v. Zurich Ins. Co.*, 293 Ill.App.3d 129, 132, 687 N.E. 2d

1099, 227 Ill.Dec. 617 (Ill.App.Ct. 1997). The major allegations of the complaint are that the Defendants filed two false and malicious lawsuits against the Tan Group; that the lawsuits terminated in the Tan Group's favor; and that the Tan Group suffered special damages because of the false and malicious lawsuits.

In addition, Forest Partners is not a debtor. Forest Partners has never filed a petition in bankruptcy and therefore cannot have suffered false claims against its bankruptcy estate. Forest Partners' claim of malicious prosecution can rest only on the state court lawsuits. Thus, the malicious prosecution suit is not an administrative matter that can exist only in the context of a bankruptcy case; it is not a proceeding arising in a case under title 11.

Having concluded that this matter is not a proceeding "arising under" or "arising in" a case under title 11, it remains to determine whether this matter is "related to" a case under title 11.

In most Circuits, a proceeding is "related to" a case under title 11 if its outcome conceivably could have any effect on the bankruptcy estate. *See In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1002, n. 11 (4th Cir.), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986); *Wood*, 825 F.2d at 93); *Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579, 583- 584 (6th Cir. 1990); *In re Dogpatch U.S.A., Inc.*, 810 F.2d 782, 786 (8th Cir. 1987); *In re Fietz*, 852 F.2d 455, 457 (CA9 1988); *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir. 1990); *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 788, and n. 19 (11th Cir. 1990). The Third Circuit first enunciated this test: "the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Pacor, Inc. v. Higgins*, 743

F.2d 984, 994 (3d Cir. 1984). The Supreme Court has commented that proceedings “related to” a case under title 11 include: (1) causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. § 541 and (2) suits between third parties which have an effect on the bankruptcy estate. *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n. 5, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995).

Nevertheless, in the Seventh Circuit, a proceeding is “related to” a case under title 11 only when it affects the amount of property available for distribution among the creditors or the allocation of property among the creditors. *Fedpak*, 80 F.3d at 214-15; *In re Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987). In *Fedpak*, the court remarked that while the Supreme Court appears to favor the broader, majority approach, it has not mandated such a definition of the term “related to.” 80 F.3d at 213 n. 8.

Forest Partners’ state law malicious prosecution claim against the Defendants is not related to the Debtor’s bankruptcy. *See, e.g., Mediterranean Assocs., L.P. v. Krupp Mtg. Co. (In re Baltic Assocs.)*, 149 B.R. 93, 95 (Bankr.E.D.Pa. 1993) (concluding that the outcome of a state law contract dispute between a non-debtor, a co-plaintiff with the debtor, and the defendant could not possibly affect the bankruptcy estate). “Overlap between the bankrupt’s affairs and another dispute is insufficient unless its resolution also affects the bankrupt’s estate or the allocation of its assets among creditors.” *Home Insurance Company v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989).

Although Tan’s part in the lawsuit arguably meets the Seventh Circuit standard and might affect the amount of property in the estate, Tan is not the only plaintiff in the action against the Defendants. Even should Forest Partners prevail in this suit and obtain a judgment for more than

\$30 million, not one penny of its judgment would go to the Debtor's bankruptcy estate. Therefore, even under the more lenient "conceivable effect" test of other circuits, Forest Partners' suit is not "related to" a proceeding under title 11.

As the Defendants point out in their argument in favor of "arising under" jurisdiction, the complaint is comprised of a single count of malicious prosecution. They state that "Plaintiffs cannot ignore or back away from their allegations of malicious prosecution within the bankruptcy in order to remand the case." Memorandum in Opposition to Motion for Remand, p. 4. No more can the Defendants ignore or back away from the presence of Forest Partners in this case. The Defendants must take the Complaint as they find it. The Tan Group has chosen to complain jointly and the Court lacks subject matter jurisdiction over Forest Partners' claim against the Defendants. Thus, this matter is not related to a proceeding under title 11.

CONCLUSION

For the foregoing reasons, the Court grants the Tan Group's Motion for Remand.

ENTERED:

Date: April 26, 1999

ERWIN I. KATZ
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

| | | |
|---------------------------------|---|-------------------------|
| In re: |) | |
| |) | |
| GALO L. TAN and MARDONA TAN, |) | No. 95 B 25570 |
| |) | |
| Debtors. |) | Honorable Erwin I. Katz |
| <hr/> | | |
| |) | |
| FOREST PARTNERS II LIMITED |) | |
| PARTNERSHIP and GALO M. TAN, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| ii. |) | No. 98 A 02049 |
| |) | |
| FOREST GROUP, INC. ROBERT LANE, |) | |
| RANDALL PITTMAN, LAURENCE |) | |
| LENZ, JR., and KATTEN, MUCHIN & |) | |
| ZAVIS, a law firm partnership, |) | |
| |) | |
| Defendants. |) | |

ORDER

IT IS HEREBY ORDERED that for the reasons set forth in the accompanying Memorandum Opinion, this adversary proceeding is remanded to the Circuit Court of Cook County, Illinois.

ENTERED:

Date: April 26, 1999

ERWIN I. KATZ
United States Bankruptcy Judge